n the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-62

HUBERT WHEELER, et al.,
Petitioners,

vs.

ANNA BARRERA, et al.,
Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AMICUS CURIAE BRIEF OF MISSOURI COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY

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IDENTIFICATION AND INTEREST OF AMICUS

Amicus curiae Missouri Coalition for Public Education and Religious Liberty is a not-for-profit organization incorporated under the laws of the State of Missouri. This

Coalition has two basic purposes: (1) To promote a system of public education that is open to all without respect to race, religion, creed, color or national origin and (2) to preserve religious liberty and related rights guaranteed by the Constitutions of the United States and State of Missouri. Where laws threaten either or both of these purposes, amicus believes, it is appropriate for the Coalition, to the extent its resources will permit, to present its views to the judiciary for its review.

The Coalition has two kinds of members: individual and organizational. Individual members are citizens—in each case, taxpayers, to the best of our knowledge—who share the Coalition's purposes. Organizational members are groups which also share these purposes and which choose to work together in support of them. Organizational members include religious, educational, libertarian, and other bodies. For illustrative purposes, we identify a few organizations, which are representative of others: American Civil Liberties Union of Western Missouri, American Jewish Congress of the Southwest Region (St. Louis), Americans United for Separation of Church and State (Kansas City and St. Louis chapters), Christian Life Commission of the Missouri Baptist Convention, Missouri Association of Elementary School Principals, Missouri Congress of Parents and Teachers, Missouri School Boards Association, and Reorganized Church of Jesus Christ of Latter Day Saints. Though the Coalition's members may hold varying religious, philosophical, ethical, economic, and political views, they are in basic agreement in respect to public education's important place in American society and to the importance of First Amendment principles to American government, religion, and society.

STATEMENT OF FACTS AND QUESTIONS

Amicus accepts the statement of facts made by the United States Court of Appeals for the Eighth Circuit (hereinafter appellate court). *Barrera* v. *Wheeler*, 475 F. 2d 1338, 1340-1342 (1973). Amicus has carefully read the injunction and judgment issued on May 9, 1973, by the United States District Court for the Western District of Missouri, Western Division (hereinafter trial court) in compliance with the appellate court's mandate. Amicus believes that the statement of the case in the petition for writ of certiorari is accurate. Petition for Writ of Certiorari, at 4-47 (filed July 5, 1973).

Amicus respectfully suggests that the issue, phrased in petitioners' questions, may be clarified as several questions: Does Federal law mandate what the trial court orders? Does Federal law establish the principle of comparability and, in light of Federal law's prohibition of Federal control, require each state to apply it to services and delivery thereof to parochial and private school students? Do the constitution, law, and case law of the State of Missouri authorize said principle of comparability? Would the trial court's order aid parochial and private schools in any way? Do the procedures mandated by the trial court necessitate administrative entanglement between agents of State and Church? Does the trial court's order carry a potential for continuing political controversy and division along religious lines? In answer to said questions, amicus respectfully offers the following arguments.

ARGUMENTS

1. The Elementary and Secondary Education Act of 1965 does not mandate the delivery of Title I services which the District Court ordered.

The trial court has ordered that public school personnel services financed by Title I funds must be sent into parochial and private schools during regular school hours if such services are provided in public schools during said hours.

The Federal courts which have reviewed the evidence in this case to date have found, *without exception*, that the Elementary and Secondary Education Act of 1965 (hereinafter ESEA) does *not* mandate any particular Title I service and/or delivery thereof.[1]

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1. In its June 2, 1972 ruling the District Court said:

"The [*Barrera*] plaintiffs contend . . . that if the [*Wheeler*] defendants authorize the employment of teachers in public schools during regular school hours, then Title I mandates the employment of teachers in the non-public schools on an equitable basis (average expenditure per pupil).

. . .

"Title I clearly does *not* mandate the assignment of teachers paid by Title I funds to nonpublic schools. The legislative history of the Act demonstrates that such an intention was completely disavowed by every proponent of the bill." (Emphasis added).

In its March 16, 1973 majority opinion the United States Circuit Court of Appeals for the Eighth Circuit said:

"We . . . observe that no particular program, curriculum or service is mandatory under the Act. S. Rep. No. 146, 89th Cong., 1st Sess. 11 (1965); 111 Cong. Rec. 7298 (1965) (remarks by Senator Morse)." *Barrera* v. *Wheeler*, 475 F. 2d 1338, 1354 (1973).

In his dissenting opinion Judge Stephenson said:

". . . Title I of the Elementary and Secondary School Act clearly *only permits* and does not mandate assignment of

(Continued on following page)

Neither ESEA nor its regulations mandate(s) sending public school teachers into nonpublic schools. *First*, sending Title I-funded teachers into nonpublic schools is *not* among the optional "special educational services and arrangements" listed in a parenthesis of ESEA of 1965 or subsequent revisions. Sec. 205 (a) (2) of P. L. 89-10; 20 U.S.C.A. §241e (a) (2). *Second*, though regulations of the U. S. Office of Education (hereinafter USOE) mention the possibility of sending public school teachers into parochial and private schools, the language is exceedingly guarded, and certainly it does not say that public school personnel must be made available on parochial school premises during regular school hours:

> "Public school personnel *may* be made available on other than public school facilities *only to the extent necessary* to provide special services (such as therapeutic, remedial, or welfare services, broadened health services, school breakfasts for poor children, and guidance and counseling services) for those educationally deprived children for whose needs such special services were designed and *only when such services are not normally provided by the private school.*" 45 C.F.R. §116.19(e). (Emphasis added).

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public school teachers to private schools during regular school hours. That no such congressional purpose ever prevailed is evidenced by the Act's legislative history. The bill's floor manager in the House initially expressed the view that a public school teacher could not be assigned to a private school under the provisions of Title I. Following lengthy debate a compromise was carefully reached by which 'The decision about the best arrangement for providing special educational assistance under Title I is left to the public education agency of the school district, under the Constitution and laws of the State.' 111 Cong. Rec. 5979 (1965). . . . the Act is only permissive with respect to school teacher assignments . . ." *Ibid.*, at 1359. (Judge Stephenson's emphasis).

Terms like "may," "only to the extent necessary," and "only when" do not support the mandate issued by the trial court.

Therefore, the trial court's order goes far beyond anything authorized or contemplated by ESEA or regulations promulgated thereunder as construed by all Federal courts to date with the exception of the majority opinion of the appellate court.

Should Federal courts mandate Federally-financed educational services and delivery systems which ESEA neither mandates nor mentions? Amicus respectfully suggests that they should not, for such mandate would impose a judicial order where a statute is silent. Even if it be contended that Federal regulations expand ESEA and clarify the statute's silence (which argument amicus regards as unpersuasive), it must still be emphasized that Federal regulations only make personnel services and delivery thereof permissive, not mandatory. What is optional cannot be made obligatory without nullifying the principle of optionality. What is, at best, only permissive in some states, amicus suggests, should not be made mandatory in all states, including Missouri, without transgressing ESEA's clear impediment to Federalization of education.

2. The Elementary and Secondary Education Act clearly contemplates the furnishing, of personnel services in public schools during regular school hours, but it does not specify the principle of comparability which requires that teacher services made available on public school premises during regular school hours must also be furnished on parochial and private school premises during the same hours.

ESEA and legislative history thereon, amicus suggests, clearly show that Congress contemplated that Title I funds would be used to assist the public school districts or "local

educational agencies" (hereinafter LEAs) in expanding and improving their educational programs, which necessarily entail the use of personnel. However, neither ESEA nor legislative history support the principle of comparability implicit in the trial court's order—to wit, that personnel services provided in public schools must also be provided in parochial and private schools.

In its declaration of policy, Congress made it clear that ESEA was designed "to provide financial assistance" to LEAs to enable them *"to expand and improve their educational programs* . . . which contribute particularly to meeting the special educational needs of educationally deprived children" (*i. e.*, children residing where there are concentrations of low-income families). 20 U.S.C.A. §241a. (Emphasis added).

LEAs are obviously engaged in providing personnel services on public school premises during regular school hours. Congress intended to assist them in doing better what they were already doing and, of course, in adding to their programs. Congress contemplated that personnel services would be provided on public school premises during the regular school day, as appears in the list of illustrative services and methods contained in House Report No. 143, 89th Cong., 1st Sess. (1965), made by the House Committee on Education and Labor:

"Additional teaching personnel to reduce class size.

Teacher aides and instructional secretaries.

Supervisory personnel and full-time specialists for improvement of instruction and to provide related pupil services.

. . .

Classes for talented elementary students.

. . .

Special classes for physically handicapped, disturbed, and socially maladjusted children.

. . .

Remedial programs, especially in reading and mathematics.

. . .

Programmed instruction.

. . .

English programs for non-English-speaking children." *Ibid.*, at 6-7; cf. Senate Report No. 146, 89th Cong., 1st Sess. (1965), at 10-11.

Most of the services and methods listed above appear toward the top of the committee's list. Five of the first eleven in the list imply personnel services in public schools, three others of these eleven relate to teacher training, and another relates to consultants "for improvement of program." After listing forty-nine methods, each of them optional, the committee said:

> "The above enumeration is not intended in any way to limit the possible use of funds by the local [public] school district in improving *public* elementary and secondary education. However, the listing is illustrative of the many possibilities for uses of funds which are already being considered and conducted by educators." H. Report No. 143, at 7. (Emphasis added).

Public schools use teacher personnel to provide public education during regular school hours. Obviously, Congress intended for LEAs to use Title I funds for services and methods of their choosing, including personnel services.

ESEA clearly differentiates between public and nonpublic schools in respect to education. Congress's declared policy is that ESEA shall assist LEAs or public schools

The House committee's language, quoted below, can only mean that the committee did not contemplate that Title I funds would have to finance personnel services in parochial and private schools comparable to such services in public schools. Following its enumeration of forty-nine optional services or methods, some of which may include nonpublic school students, the committee said:

> *"No provision of the bill authorizes any grant for providing any service to a private institution,* but at the same time the bill does contemplate some broadening of public educational programs and services in which elementary and secondary school pupils who are not enrolled in public schools may participate. The extent of the broadened service will reflect the extent that there are educationally disadvantaged pupils who do not attend public school.
>
> *The bill does not authorize funds for the payment of private school teachers.* Nor does it authorize the purchase of materials or equipment or the construction of facilities for private schools. However, consistent with the number of educationally deprived children in the school district who are enrolled in nonpublic elementary and secondary schools, the local educational agency will make provision, under the terms of the bill, for including special educational services and arrangements such as dual enrollment, educational radio and television, educational media centers, and mobile educational services and equipment in which such children can participate.

Thus, the bill does anticipate broadened instructional offerings under publicly sponsored auspices which will be available to elementary and secondary school students who are not enrolled in public schools.

> . . . Several opportunities are afforded local public educational agencies to meet the special educational needs of elementary and secondary school pupils regardless of whether they are enrolled in public schools [i. e., nonpublic school pupils] through supplementary educational services authorized by Title I such as broadened health services, school breakfasts for poor children, and guidance and counseling." H. Report No. 143, at 7-8. (Emphasis added).

Pursuant to the reports of House and Senate committees, USOE promulgated the following regulation:

> "Provisions for special educational services for educationally deprived children enrolled in private schools shall not include the paying of salaries for teachers or other employees of private schools, except for services performed outside their regular hours of duty and under public supervision and control, nor shall they include the using of equipment other than mobile or portable equipment on private school premises or the constructing of private school facilities." 45 C.F.R. §116.19(e).

The language in ESEA respecting services for nonpublic school students suggests either teacher services in public schools via such an arrangement as dual enrollment (under which students enrolled in nonpublic schools spend part of their school day in public schools) or non-teacher services on nonpublic school premises. ESEA stipulates that an LEA's application must make

> "provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such [private school] children can participate." 20 U.S.C.A. §241e (a) (2).

The legislative history on ESEA provides no basis for the conclusion that ESEA mandates that services provided in public schools must also be provided in parochial and private schools. Rep. Perkins (Ky.), chairman of the subcommittee which drafted the bill, said: "We do not intend to put teachers in private schools, no." 111 Cong. Rec. 5747 (March 24, 1965). When Rep. Goodell (N.Y.) pressed for a clear legislative history indicating that public school teachers may teach on private school premises, Rep. Perkins said:

> "My answer is no as to providing any teaching service to a private institution. The key here is the extension of special educational services to deprived children under public auspices and arranged for [*sic*] supervised and controlled by public authority." *Ibid.*, at 5748.

When Rep. Cahill (N.J.) construed the aid-to-children principle to mean that nonpublic school students "are entitled to the same aid as those who attend public schools" and that the U. S. Commissioner of Education would have responsibility "to see that that purpose is carried out," Rep. Perkins said:

> "I cannot agree with that statement. First, administration and approval of local school district plans and conformance rests with the State educational agency" [hereinafter SEA]. *Ibid.*, at 5743.

Rep. Cahill observed that an LEA could use Title I funds to provide "additional teachers in order to reduce a very large classroom population," and he asked: "If they do this for the public schools, must they also do this for the private schools?" Rep. Perkins replied: "They cannot send a public school teacher into a private school. That is not the intent of the bill." *Ibid.*, at 5743.

Under persistent debate by congressmen who wanted parochial school pupils to share equally in ESEA benefits, Rep. Perkins eventually conceded that ESEA, if State constitution and law so authorized and an LEA so chose, would permit limited special personnel services (such as guidance and counseling) to be provided in nonpublic schools, such instances being "very rare." *Ibid.*, at 5746.

The Senate Committee on Labor and Public Welfare, Senator Morse (Oregon) reporting, also indicated that it was not contemplated that Title I services would be accommodated to the setting of parochial education. The committee said:

> "Where special arrangements (such as dual enrollment)—are made for the participation of children from private schools, it is the committee's expectation that *the arrangements will be administered in such a manner as to avoid classes which are separated by religious affiliation.*" S. Report No. 146, at 11. (Emphasis added).

Thus, according to Congress's intent, Title I funds are not to finance educational services in classes segregated by religion.

Religious separatism is so characteristic of parochial schools (which serve over ninety-five per cent of nonpublic school pupils in Missouri) that any program of teacher services on parochial school premises would offend the principle that public funds shall not finance classes segregated according to religion.[2]

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2. It should here be noted that USOE has taken great liberties with the Senate committee's clear language. USOE's regulations have restricted the no-religious-segregation principle—perhaps deliberately—to programs conducted in public schools—that is, to dual enrollment programs only. Obviously the phrase

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If ESEA is not the source of the concept of comparability implicit in the trial court's order, whence comes the concept? One source is regulations promulgated by USOE; 45 C.F.R. §116.19 (a) which states that nonpublic school children "shall be provided genuine opportunities to participate" in Title I services, and 45 C.F.R. §116.19 (b) which states that the number of nonpublic school children and

> "the *types* of special educational services to be provided for them, *shall be determined . . . on a basis comparable* to that used in providing for the participation in the program by educationally deprived children enrolled in public schools." (Emphasis added).

Another source is the majority ruling of the appellate court that USOE regulations require

> "a program for educationally deprived non-public school children that is comparable in quality, scope and opportunity, which may or may not necessarily be equal in dollar expenditures to that provided in the public schools." *Barrera, supra,* at 1344.

Amicus suggests, however, that the concepts of "genuine opportunities" and "basis comparable" as used in 45

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"special arrangements (such as dual enrollment)" is much more restrictive than the following language in USOE's regulations:

> "Any project to be carried out in *public facilities* and involving a joint participation of children enrolled in private schools and children enrolled in public schools shall include such provisions as are necessary to avoid classes which are separated by school enrollment or religious affiliation of the children." 45 C.F.R. §116.19(d). (Emphasis added).

USOE's regulation applies *only* to dual enrollment projects in public schools or facilities. Since public schools are already prohibited from segregating pupils according to religious affiliation, it is pointless for USOE regulations to prohibit religious segregation in Title I projects only if they take place in public school facilities.

C.F.R. §116.19 (a) and (b) are not the same as the concept of comparability implicit in the trial court's order. The court concluded that comparability requires that personnel services for nonpublic school pupils shall be comparable and equitable to services for public school children in respect to place (premise "where the pupil regularly attends") and time ("during regular school hours"). The court ordered that services and activities for eligible nonpublic school students must be "comparable and equitable in quality, scope, and opportunity for participation to those provided to eligible public school pupils similarly situated." USOE regulations merely order that the basis for determining the types of services for nonpublic school children shall be comparable to the basis applying to public school students.

Even if ESEA and USOE regulations should require the principle of comparability implicit in the trial court's order, which amicus does not grant, this principle is too vague to serve as a useful guide. The appellate court noted that

> "The analysis of whether the program within the private school is comparable to the public school program lends itself more to the definition of what is not a comparable program rather than what is." *Ibid.*, at 1348.

Amicus suggests that LEAs, SEAs, and USOE will find it no more easy to define comparability than the appellate court did. One—and perhaps the only objective—index to comparability is invalid and inapplicable. "Fair-sharing of funds is not the intent of Title I." *Ibid.*, at 1347. The trial court's order implies that different places (public and nonpublic school premises) and same time (regular school hours) are the decisive determinants of comparable and

equitable personnel services. Amicus suggests that the concept of comparability in the instant case is so vague that it can only encourage arbitrary appraisal.

3. In light of the prohibition against Federal control of federalization of education under the Elementary and Secondary Education Act and in light of the requirement that Title I programs must accommodate State law, it is decisive in the instant case that neither Missouri's Constitution, law, nor case law authorizes the delivery of educational services to nonpublic school children which the District Court's order would impose.

ESEA explicitly prohibits Federal control or federalization of education.[3] USOE recognizes that ESEA forbids Federal control.[4] If Title I programs are to avoid

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3. This prohibition appears in Sec. 604 of P. L. 89-10 (ESEA of 1965), as quoted in *Barrera, supra*, at 1351, n. 22. Congress has subsequently reaffirmed the prohibition against Federal control, the present statutory wording being as follows:

> "No provision of . . . the Elementary and Secondary Education Act of 1965 . . . shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system . . ." 20 U.S.C.A. §1232a, 1973 pocket part.

4. One of USOE's early publications says: "Federal control of any aspect of education at any level . . . is prohibited." *Guidelines: Special Programs for Educationally Deprived Children*, ESEA of 1965/Title I, OE-35079, at 1; see Exhibit No. 2 (Form OE-4315) for evidence that "State policies, requirements, or standards" apply to ways determining how nonpublic school children may be included. To the best of amicus's knowledge, USOE has never claimed that its administrative power permits it to determine what educational services are to be provided by an LEA or how they are to be delivered. USOE has no enforcement power except the power to withhold funds. *Lopez* v. *Luginbill*, ____ F. 2d ____ (10th Cir., August 28, 1973).

Federal control, they must be consistent with State constitutional and statutory provisions.[5]

The prohibition against Federal control must necessarily include the services which a state will provide nonpublic school children and the way it will deliver these services. Federalization of education will be the inevitable effect of any mandate that, where Federal funds are involved, a state must provide nonpublic school pupils with comparable and equitable personnel services available to public school students.

In light of ESEA's prohibition against Federal control and its requirement that Title I programs must accommodate State law, it is pertinent to cite Missouri's Constitution, case law, and statutes respecting (1) the principle of comparability as it applies to parochial and private school pupils and (2) sending public school personnel into nonpublic schools to provide special educational services comparable to these available in public schools during regular school hours.

The inescapable conclusion is that the State of Missouri's legal framework provides no—absolutely no—basis for what the trial court's order would impose.

Amicus respectfully calls attention to Missouri's affirmative constitutional principle that the State and its

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5. Rejecting the argument that, because of conflict between Federal and State laws, "the supremacy requirements dictate that federal law controls" on Title I matters, the appellate court said:

> "This approach . . . substantially ignores the legislative history of Title I which establishes that state policy and law shall govern the administration of these programs. Moreover, Congress has emphatically declared in the act that federal control of programming, instruction and curriculum was prohibited, and the Commissioner of Education has continually recognized that the grants under Title I must accommodate state law." *Barrera, supra*, at 1351.

political subdivisions (including LEAs) shall establish and maintain public schools and education. The State legislature shall establish and maintain free public schools (Mo. Const., Art. IX, Sec. 1). At least one-fourth of the money in the State's general fund shall go to the public school fund (Art. IX, Sec. 3). This fund and other funds for public school purposes shall be used to establish and maintain public schools "and for no other uses or purposes whatsoever" (Art. IX, Sec. 5). The legislature shall appropriate funds from the State treasury "for the purpose of public education" (Art. III, Sec. 36) —and presumably not for the purpose of nonpublic education or educational services in nonpublic schools.

Missouri's SEA and LEAs, subject to the foregoing provisions, are justified in accepting Federal funds which, according to ESEA, are designed to assist LEAs (public schools) in expanding and improving their special programs to serve educationally deprived students. The stated purpose of ESEA—at 20 U.S.C.A. §241a—is compatible with the State of Missouri's affirmative policy of establishing public schools and providing educational—including personnel—services in public schools and under public school auspices.

Amicus also calls attention to Missouri's negative constitutional principle that neither the State nor any of its political subdivisions (including ESEAs) shall provide direct or indirect aid (Art. I, Sec. 7) to religion, its education, or its schools; no payment shall be made "from any public fund whatever . . . in aid of any religious creed, church or sectarian purpose, or to help to support or sustain" any church-controlled school of any kind at any level of education (Art. IX, Sec. 8).

Missouri's Supreme Court ruled, after the enactment of ESEA, that the State constitution prohibits the use of

public funds to send public school teachers into nonpublic schools to provide special educational services during regular school hours, for this method does *not* establish and maintain public schools. *Special District* v. *Wheeler*, 408 S. W. 2d 60 (Mo., 1966). Specifically, the State court ruled against the two methods which *Barrera* plaintiffs contended are the only two methods for providing comparable and equitable teacher services for parochial school students—shared-time and on-premises methods.[6] Plaintiffs' Brief before trial court, at 40-41. The appellate court interpreted the *Special District* ruling to mean that

> "dual enrollment is presently unlawful in Missouri by statutory interpretation and the use of *'public monies'* for sending public teachers into private schools for specialized instruction has been forbidden by state constitutional provisions." *Barrera, supra*, at 1350. (Emphasis added).

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6. The Missouri Supreme Court described two challenged special education practices as follows:

> "During the 1963-64 school year, the Special [public school] District provided speech therapy to parochial school children by sending its speech teachers (clinicians) into the parochial schools. . . .
>
> During the 1964-65 school year the Special District changed its program and provided speech therapy for parochial school children in buildings maintained by the Special District. Parochial school children who desired such therapy were released from the parochial schools for part of their regular six-hour school day." *Special District, supra*, at 62.

About the 1963-64 practice the court said:

> "Is the use of public school moneys to send speech teachers of the Special District into the parochial schools for speech therapy a use for the purpose of maintaining free public schools? We think not. The use of public school funds for the education of pupils in parochial schools is not for the purpose of maintaining free public schools. We hold the 1963-64 practice unlawful and invalid." *Ibid.*, at 63.

The court ruled against the 1964-65 practice on the grounds that Missouri's compulsory attendance and school-day statutes do not permit dual enrollment.

Amicus calls this Court's notice to the fact that Missouri's General Assembly has repeatedly *defeated* bills to establish special educational procedures which the *Special District* decision overturned. In 1967 the chief emphasis was on the dual enrollment procedure; the defeated bill was House Bill No. 24, 74th General Assembly, Reg. Sess. After the U. S. Supreme Court's ruling in *Board of Education* v. *Allen*, 392 U. S. 236 (1968), the emphasis shifted to an on-premises method like that mandated in the trial court's order now at bar. The following bills, *all* of which the Missouri General Assembly *refused* to enact, would have authorized the use of "general revenue" to send public school special education teachers into parochial and private schools during regular school hours: House Bill No. 639 (1969) of the 75th General Assembly, House Bill No. 26 (1971) and Senate Bill No. 532 (1972) of the 76th General Assembly, and House Bill No. 219 (1973) of the 77th General Assembly, which would have established the principle of comparability and the same method of delivery of special educational services that appear in the trial court's order now before this Court.[7]

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7. Section 9 (4) of *defeated* House Bill No. 219 (1973) would have defined services provided on an "equal basis" (comparability) as

> "*services* made available to children enrolled in nonpublic schools shall be *as nearly equal as practicable*, within the limits of the funds appropriated for the implementation of this act [H. B. 219], to services made available to children enrolled in public schools, i. e. the amount expended per pupil served and the proportion of children given the opportunity to participate in relation to the number of children needing the service shall be *as nearly equal as practicable* and *where services are provided to public school pupils at school premises where they regularly attend, that same service shall be made available to nonpublic school pupils at the school premises they regularly attend. If services are provided to public school pupils during regular school hours, those same services shall also be provided to nonpublic school children during the same hours.*" (Emphasis added).

The only significant difference between the principle of comparability and method of achieving it as mandated by the trial court and the philosophy and method rejected by the Missouri Supreme Court in *Special District* and/or General Assembly in defeating the aforementioned bills is the identity of the funds from which to finance the services offered.[8]

In early 1970 the Missouri Attorney General came up with another proposal for circumventing the *Special District* ruling. Acknowledging that State funds cannot be used to send public school teachers into parochial schools to provide special education, he nevertheless proposed that Federal funds can be used for this purpose.[9] Op. Atty.

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8. Some Missouri legislators have suggested that a way to circumvent the *Special District* ruling is to finance special educational services from "general revenue" or to prevent the commingling of special educational funds with funds mentioned in Article IX of the Missouri constitution. For example, some 1971-72 bills which employed this circumventing tactic are House Bill No. 26 (sending public school personnel into parochial schools to provide special educational services during regular school hours—the method in the trial court's order in the instant case), House Bill No. 30 (contract for the purchase of parochial schools' so-called "secular" services—the method which this court ruled unconstitutional in *Lemon* v. *Kurtzman*, 403 U. S. 602 [1971]), and House Bills Nos. 389 and 1385 (tuition reimbursement—the method which this court ruled unconstitutional in *Committee for Public Education and Religious Liberty* v. *Nyquist*, ___ U. S. ___, 93 S. Ct. 2955 (1973). House Bill No. 219 of 1973, containing the definition of "equal basis" quoted in note 7 above, also contained the same provisions. The legislature *defeated* all of the said bills.

9. It is unknown to amicus whether USOE's publicity about an opinion by New York's Attorney General in 1965—Letter, Atty. Gen. Lefkowitz to Commissioner of Education Allen, July 15, 1965—stimulated the Missouri Attorney General to issue his opinion or whether parochial school interests in Missouri urged him to imitate the New York attorney general. For evidence of USOE's publicity, see quotation from the USOE *Handbook* in *Barrera*, *supra*, at 1351, n. 23, particularly the paragraph which says:

> "A number of [state] school officials realized that they could not submit the required assurance because of the re-

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Gen. No. 26, 1-29-70. He held that Congress intended for Title I funds to finance public school personnel in parochial and private schools, that Missouri's laws do not prevent it, and that Federal funds are not public funds, thus immune to Missouri's constitutional provisions.

Amicus suggests that the Missouri Attorney General's opinion is questionable at several points. (1) It ignores ESEA's prohibition against Federal control and its clear intent that Title I programs must comply with State law and concludes that Congress intended that, as necessary and "under certain circumstances" (which the Attorney General made no effort to define or explain), public school personnel would go into nonpublic schools. Op. 26, at 5. (2) It rests on the erroneous assumption that public officials may do anything not expressly forbidden by constitution or statutes; since Missouri school law does not pointedly prohibit the use of Title I funds to send public school personnel into nonpublic schools, the Attorney General implied, the practice is permissible. *Ibid.*, at 6. (3) It suggests that the *Special District* decision is inapplicable to Title I programs for the mere reason that these programs are financed from Federal funds, not from State funds. *Ibid.*, at 7. (4) It curiously holds the Federal funds are not public funds under the meaning of Missouri's

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Footnote continued—

> strictions applying to private school students which were operative in their States. The impasse was successfully resolved in one case by a State attorney general's opinion which held that State restrictions were not applicable to 100 percent federally financed program. [New York]"

The rationale of New York Attorney General's opinion is not applicable to Missouri—for the simple reason that the constitutions of the two states differ. New York's Constitution refers to "money of the state" (Art. VII, Sec. 8) and state property and credit (Art. XI, Sec. 3), but Missouri's Constitution uses more comprehensive terms like "public treasury" (Art. I, Sec. 7), funds for "public school purposes" (Art. IX, Sec. 5) or "public education" (Art. III, Sec. 36), and no "public fund whatever" (Art. IX, Sec. 8).

Constitution and therefore that they are immune to Missouri's constitutional prohibitions. *Ibid.*, at 6. (5) It erroneously interprets a sentence in Article III, Section 38 (a) of Missouri's Constitution as "positive authorization" for using Federal funds to send public school personnel into nonpublic schools because Congress intended it. *Ibid.*

Since the Attorney General's opinion is germane to the issue at bar, amicus respectfully explains why it does not justify the practice mandated by the trial court. Most crucial is the Attorney General's contention that Federal funds are not "public money," an opinion that is erroneous on its face. He based his opinion on an inadequate reading of *State ex rel. St. Louis Police Relief Association* v. *Igoe et al.*, 107 S. W. 2d 929 (Mo., 1937). The issue in *Igoe* was whether funds which policemen had paid from their own pockets into their own relief fund were private or public money. *Ibid.*, at 630. The court rightly ruled that these were private funds. The court quoted the definition of "public funds" in 50 C. J. 850:

> "funds belonging to the state or any county or political subdivision of the state; more especially taxes, customs, moneys, etc., raised by operation of some general law, and appropriated by the government to the discharge of its obligations, or for some public or governmental purpose." *Igoe, supra*, at 933.

The Attorney General apparently jumped to the conclusion that, since 50 C. J. 850 did not mention the Federal Government, Federal funds are not public funds.

Any attempt to make a legal distinction between Federal and State monies (*Barrera, supra*, at 1351-2) is fanciful at best, for Missouri's Constitution forbids "the use of 'public monies' for sending public teachers into private schools for specialized instruction" (*ibid.*, at 1350). If

Title I funds are "public monies," as amicus suggests they are, they, because of ESEA's prohibition against Federal control, come under Missouri's constitutional provisions respecting the use of public funds for public educational purposes (Art III, Sec. 36; Art. IX, Secs. 3 and 5) and prohibiting payments "from any public fund whatever" to aid education in or to help to support or maintain church-controlled schools (Art. IX, Sec. 8). For, if the fact that certain funds given to the State of Missouri or its LEAs for certain educational purposes are Federal funds removes them from the controlling influence of Missouri's Constitution and school laws, Missouri's acceptance of Federal funds will inevitably result in Federal control.

Obviously, Federal funds for Title I programs have all earmarks of public funds under *Corpus Juris's* definition quoted above. They are "raised by operation of some general law" pursuant to Article I, Sec. 8 of the U. S. Constitution. Congress appropriates them "for some public or governmental purpose." ESEA provides that Title I funds are to go to State SEAs and LEAs which operate under State law. USOE makes payments "to each State" to finance LEAs' programs and SEA's administrative functions. 20 U.S.C.A. §241g (a) and (b). USOE regulations require the SEA to "designate the officer who will receive and have custody of *funds granted to the State under Title I.*" 45 C.F.R. §116.31 (e). (Emphasis added). In Missouri Title I funds go into the State treasury and are under the custody of the State Treasurer who has no legal duty unrelated "to the receipt, investment, custody and disbursement of *state* funds." Mo. Const., Art. IV, Sec. 15. (Emphasis added). It is Congress, not Missouri's General Assembly (as implied in *Barrera, supra*, at 1352), which has specified that Title I funds are to go to the State, granted in trust for the purpose of assisting LEAs "to ex-

pand and improve their educational programs" for the benefit of certain children. 20 U.S.C.A. §241a. The facts that Title I funds are to be used to meet the special educational needs of certain children and that they are not to be commingled with other public funds (as affirmed in *Barrera, supra*, at 1352) do not negate the facts that Title I funds are to go to each State and that they are to be expended for programs accommodated to State Constitution and law. The Missouri Attorney General's opinion to the contrary notwithstanding, Title I or Federal funds are public funds; statutorily granted to the State of Missouri and its LEAs for expenditure under State law, they are subject to Missouri law.

The last sentence of Article III, Section 38 (a), quoted as follows in *Barrera, supra*, at 1353,

> "Money or property may also be received from the United States and be redistributed *together with public money of this State* for any public purpose designated by the United States." (Court's emphasis),

does not authorize, amicus respectfully suggests, the use of Title I funds to send public school teachers into parochial and private schools. Amicus suggests several reasons why the quoted sentence does not justify the practice mandated by the trial court's order. (1) The use of the conjunctive "and" indicates that the quoted sentence anticipated programs under which Federal and State funds are *mixed or commingled*. (2) Title I funds are not to be commingled with other public funds or to supplement other funds for educational purposes (45 C.F.R. §116.24; cf. *Barrera, supra*, at 1352), so it is impossible for them to "be redistributed together with public money of this State." (3) Title I programs are financed 100 per cent from Federal funds, so there is no redistribution "together with the

public money of this State." (4) Section 38(a) of Article III of Missouri's Constitution prohibits granting or lending public money or property "to private persons, associations or corporations" except as expressly authorized herein, so it is therefore reasonable to assume that the last sentence of said section deals with the subject of granting or lending of public money or property to *private* interests. (5) There is no indication in the trial court's record, according to our understanding, that this suit deals with granting public money or property to private persons, associations, or corporations; indeed, the record is to the contrary. Plaintiffs want public school teachers under public control to provide publicly-financed services on nonpublic school premises; they are not seeking, as we understand it, to have Title I funds or Federally-financed properties granted to nonpublic school persons, associations, or corporations. (6) The sentence mentions "any public purpose designated by the United States," language which, if at all applicable to Title I, would relate to P. L. 89-10's declaration of policy that the designated public purpose is to assist LEAs to expand and improve their services to meet special educational needs of educationally deprived children. 20 U.S.C.A. §241a.

Amicus respectfully suggests that there is nothing in Missouri's Constitution, statutes, or case law to authorize what the trial court's order would impose on the State of Missouri, such mandate being contrary to ESEA's explicit prohibition against Federal control. If the trial court's order stands, the Federal law's assurance against Federal control will be rendered inoperative, and each State will have to observe the terms set forth in said order. In short, the trial court's order can only result in federalization of education, contrary to assurances given at the time ESEA was enacted and also contrary to the historic tradition that education is reserved to the States or the people under the Tenth Amendment.

4. Since teacher services are inextricably a part of a school's operations, the providing of publicly-financed teachers in parochial schools for any educational services during regular school hours is impermissible aid to the schools themselves.

Common sense confirms the truism that teacher services are intrinsic to the life of any school. Without teaching personnel, a school would have no service to provide children. A school, therefore, must provide teacher services in order to be faithful to its *raison d'etre*.

If public funds finance teachers in parochial or private schools during regular school hours, tax funds aid these schools, relieving them of the expense of financing said teachers from private funds. This is the effect regardless of whether such publicly-financed teachers are called public or nonpublic teachers, whether their services are called special or general education, and whether they are technically under public or nonpublic control. Applying the clear logic used by this Court in *Norwood* v. *Harrison*, ... U. S. ..... (1973), amicus uses the Court's equally-clear language to suggest that publicly-financed teachers on nonpublic school premises during regular school hours "are a form of financial assistance inuring to the benefit of the private schools themselves." An inescapable educational cost for schools, whether public or private, is the expense of providing all necessary teacher services. "When . . . that necessary expense is borne by the State, the economic consequence is to give aid to the enterprise" in which the school is engaged. Slip Op., at 8-9. The basic enterprise of parochial schools, because of the permeation of religion throughout said schools' curriculum and operations, is religion-oriented. *Lemon* v. *Kurtzman*, 403 U. S. 602, 615-619 (1971).

ESEA contains no word suggesting, and certainly nothing requiring, that Title I funds are to finance teacher

services in parochial schools on a basis comparable to such services in public schools. Even congressmen who most ardently supported aid to educational services for parochial school students recognized that Title I funds could not go directly to parochial schools for teacher services, *e.g.*, see comment by Rep. Goodell that private schools are not to get any money under ESEA. 111 Cong. Rec. 5747. A USOE regulation, while permitting limited personnel services "on other than public school premises," specify that such services may be provided "only when such services are not normally provided by the private school."[10] 45 C.F.R. §116.19 (e). This regulation implies what amicus argues—namely, that the so-called aid-to-child principle does not apply to anything for which a parochial school has been assuming financial responsibility. This Court's explanation of the aid-to-child principle implies the same thing, as amicus understands it; if private school students or parents have not been providing textbooks or if private schools have been providing them without direct cost to parents or pupils, the aid-to-child principle would be inapplicable. *Board of Education* v. *Allen, supra,* at 244, n. 6.

There is no essential legal distinction, amicus suggests, between an LEA's giving tax funds to a nonpublic school to finance particular teacher services, on the one hand, and an LEA's sending publicly-financed personnel into nonpublic schools to provide these particular teacher services, on the other. Any difference is one of means, not of effect.

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10. Amicus observes that the trial of this case did not deal with whether or not any parochial or private school in Missouri has normally provided remedial instruction to any student. If it has done so, its students would presumably be excluded from the program contemplated by the trial court's order, according to USOE's regulation. It would entail considerable entanglement for public school officials to have to ascertain in detail what personnel services nonpublic schools have formerly offered before they could comply with the regulation cited. Missouri school law does not authorize public school officials to meddle with private schools in such fashion.

In either case, the effect is to use public funds to provide particular teacher services in nonpublic schools. ESEA funds shall *not* be used to pay salaries "for teachers or other employees of private schools, except for services performed outside their regular hours of duty." 45 C.F.R. §116.19 (e). There is no legal distinction between the use of ESEA funds to pay salaries of personnel of nonpublic schools and the use of such funds to pay salaries of personnel serving in such schools. What cannot be done directly cannot be done indirectly. *Wolman* v. *Essex*, 342 F. Supp. 399, 412 (1972), aff'd, 409 U. S. 808 (1972).

It is unconstitutional under the Establishment Clause for a State to pay even a part (15%) of the salary of a teacher of secular educational services of *and in* parochial schools. *Lemon*, *supra*. What is invalid for states under the First Amendment is also impermissible for the Federal Government. Amicus respectfully argues that it is unconstitutional to use Title I funds to finance secular teacher services in parochial schools during regular school hours.

5. The District Court's mandate necessitates an intimate, enduring, and excessive entanglement between agents of State and agents of Church, thereby violating the Establishment Clause of the First Amendment.

The trial court's mandate contains two features which necessarily require an administrative entanglement between agents of State and agents of Church: (1) mandatory sending of public school teachers into parochial schools if these teachers provide Title I services in public schools and (2) mandatory inclusion of parochial school officials "in the planning and evaluation of . . . Title I projects at all stages." Injunction and Judgment, points 1 and 4.

In Missouri around ninety-five per cent of all private school students are enrolled in parochial or church-related

schools, and around eighty-eight per cent attend denominational schools fitting this Court's description in *Lemon*, *supra*. Mandating that public school teachers must provide services "on the private school premises where the private school child regularly attends," the trial court necessarily requires public school personnel to do some of their regular work on parochial school premises. In providing that LEA applications under Title I "shall clearly evidence that persons knowledgeable" of private school pupils' needs "have been consulted in the planning and evaluation of . . . Title I projects at all stages," the court requires public school officials to be administratively entangled with parochial school officials and/or teachers.

The Government's post-audit power over parochial schools' books to insure that tax funds finance only secular education in parochial schools involves public officials in "an intimate and continuing relationship between church and state." *Lemon*, *supra*, at 621-622.

The trial court's mandate necessarily requires a more intensive administrative entanglement than that invalidated by *Lemon*. The mandate puts parochial school officials and/or teachers into every stage of Title I programs serving parochial school students. Public school officials (LEA) must consult parochial schoolmen about parochial school pupils' needs, and these parochial school officials must plan and evaluate the programs. Moreover, public school personnel must carry out Title I projects on premises under the control of parochial school officials.

Any way one slices the arrangement mandated by the trial court it comes out as entanglement. If public school officials accept the plans or evaluations suggested by parochial school officials, there is administrative entanglement. If public and parochial school officials work together in planning, conducting, and evaluating Title I

projects involving parochial school pupils, there is close and continuing entanglement.

Pupil school personnel, according to the trial court's order, would have to work closely with, and perhaps under the supervision of, parochial school teachers and/or officials who have court-mandated roles in planning and evaluating Title I projects. These public school personnel would have to satisfy parochial school officials who have a voice in evaluating special educational services.

Among the evils the First Amendment was designed to prevent is public officials' active involvement in religious activities. *Walz* v. *Tax Commission*, 397 U. S. 664 (1970). No less offensive is ecclesiastical officials' active involvement in the administration of public policy. The no-entanglement test calls "for close scrutiny of the degree of entanglement involved in the relationship" between public and religious institutions. "The objective is to prevent, as far as possible, the intrusion of either into the precincts of the other." *Lemon, supra*, at 614.

The trial court's mandate puts public and religious personnel into each other's precincts. Under the mandate, church school personnel must enter into public schools' precincts in planning and evaluating Title I educational projects of the public school district, and public school personnel must enter into church school officials' precincts in providing educational services. It would be difficult to imagine an arrangement more pregnant with entanglement.

6. The District Court's mandate carries a potential of political divisiveness along religious lines, contrary to the First Amendment.

Two principles of the trial court's mandate—comparability and on-premises services—carry the potential of political division along religious lines. If armed with this

Court's approval, they would necessarily encourage an expansion of Federal aid-to-education programs under which (1) taxpayers will be responsible for financing comparable educational services for eligible students regardless of which school they attend (public, parochial, or private) and (2) such services made available on public school premises must also be provided on parochial and private school premises.

The fact that Title I contemplates special educational services, not general education, is of no legal consequence in respect to the principles of comparability and on-premises services. What is special education?

ESEA does not define special education. The law contemplates that ESEA funds will be used to meet "the special educational needs of educationally deprived children" (i. e., children residing where there is a concentration of low-income families), but it also contemplates that these funds will assist local public school districts "to expand and improve their educational programs." 20 U.S.C.A. §241a.

The legislative history shows that Congress made no effort to establish a legal distinction between special and general education. Instead, it left it up to schoolmen to make this differentiation.[11]

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11. The following excerpts from the legislative history are apropos:

"Mr. GOODELL. The question was very simple: Where the local law, the State law and constitution will permit, can a public-school teacher of music, of physical therapy, or of some other subjects—and I would like to know where your boundary is in subjects—teach private-school pupils in a private school? . . . There are a good many people who believe in the private schools and private school pupils getting equal treatment, who think the answer is 'yes.' . . .

. . .

Mr. PERKINS. . . . throughout the years there have been people who have endeavored to get a religious contro-

(Continued on following page)

In the absence of a legal definition of special education, the definition of "special personnel services" as used in the trial court's mandate is imprecise or vague. Thus, because of statutory vagueness, the mandate means that public school agents, administratively entangled with parochial and private school agents, may, insofar as the law's letter is concerned, use Title I funds for anything that they think may meet the special educational needs of educationally

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Footnote continued—

versy started. I think the bill is perfectly clear. I cannot visualize a situation anywhere that a local board of education would undertake to put a public-school teacher in a private school for general purposes.

. . .

Mr. PUCINSKI. . . . I think that the gentleman from New York is looking for answers that cannot be found in this bill because they are not in the bill. You are raising all kinds of questions about the private schools. This bill outlines very specifically and categorically what the private schools can and cannot do with the money they get from the Federal Government. . . .

Mr. GOODELL. I did not know the private schools were going to get any money from the Federal Government.

Mr. PUCINSKI. That is exactly it. This bill clearly spells out private schools cannot get any direct assistance . . .

What this bill says is a child attending a private school needing additional instruction may get that instruction in a public school institution and for the gentleman to suggest that there is anything in this bill that is going to pour Federal funds directly into a private school is to muddy the waters. . . .

. . .

Mr. GOODELL. . . . If the public school officials with Federal money wish to put a public school teacher in a private school to teach any subject, I would like to have a clear legislative history as to whether it is permitted in this bill.

Mr. CAREY. If the gentleman phrases his question 'any subject,' the answer would be 'No,' because that would include all subjects.

Mr. GOODELL. What subjects then would be permitted?

Mr. CAREY. 'Special' is the key word. The gentleman knows that the word 'special' is in the bill. These are special instructional services. Those that are special are not general. We do avoid the whole question. We do not intend to go into the question what would be general instruction because we do not find it in this bill. What is special would be determined by pedagogy." 111 Cong. Rec., at 5747.

deprived (i. e., economically disadvantaged) children and that comparable personnel services shall be provided in both public and nonpublic schools.

Is it proper to define special education as education that is compensatory or supplementary, not substitutionary? ESEA services have been called compensatory. A teacher service that takes the place of another teacher service at a given time would seem to be substitutionary, not supplementary.[12]

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12. Since human beings are not ubiquitous, a school child can be in only one place at a given time; a student receiving Title I personnel services during any regular school hour cannot receive any regular personnel services at the same hour. Whereas educators may classify Title I personnel services as compensatory, these services may actually be substitutionary, not supplementary, when provided during regular school hours. To receive Title I personnel services during the regular school day the student has to forego regular personnel services otherwise available to him at the same time. Amicus wonders if the offering of some, perhaps many, Title I personnel services during regular school hours has contributed to the woeful performance under ESEA which President Nixon lamented in his special message to Congress on March 3, 1970. In discussing the educational plight of poor children after four years of ESEA programs, the President said:

> "(a) *Compensatory Education.* The most glaring shortcoming in American education today continues to be the lag in essential learning skills in large numbers of children of poor families.
>
> In the last decade, the Government launched a series of ambitious, idealistic, and costly programs for the disadvantaged, based on the assumption that extra resources would equalize learning opportunity and eventually help eliminate poverty.
>
> In some instances, such programs have dramatically improved children's educational achievement. In many cases the programs have provided important auxiliary services such as medical care and improved nutrition. They may also have helped prevent some children from falling even further behind.
>
> ***However, the best available evidence indicates that most of compensatory education programs have not measurably helped poor children catch up.***
>
> Recent findings on the two largest such programs are particularly disturbing. We now spend more than $1 billion a year for educational programs run under Title I of the

(Continued on following page)

If this Court arms the trial court's mandate with approval, the precedent will be set for an expansion of Title I programs embracing the principle of comparability and requiring that all Title I personnel services furnished on public school premises during regular school hours must also be provided on church and private school premises during the regular school day.

Since ESEA leaves it up to LEAs to determine what kind of services, including personnel services, to provide, it would take no further legislative action to create a situation in which political pressures from church schools would be set in operation against LEAs. There would be neither statutory nor judicial protection against these pressures. Each LEA would have to involve parochial schoolmen "at all stages" (to use the trial court's phrase) related to Title I programs. In addition to patent entanglement along administrative lines, such a situation is pregnant with the potential of political division along religious lines.

Implicit in the trial court's mandate that an LEA's application "shall clearly evidence that persons knowledgeable of the needs of the private school children have been consulted in the planning and evaluation of such Title I projects at all stages" is the prospect that parochial schoolmen will have veto power over ESEA programs involving both public and nonpublic school children, since comparable services must be provided. The effect of such an arrangement would be to give nominal supervision to public schoolmen but actual control to church schoolmen. To be

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Footnote continued—

Elementary and Secondary Education Act. Most of these have stressed the teaching of reading, but before-and-after tests suggest that only 19% of the children in such programs improved their reading significantly; 13% appear to fall behind more than expected; and much more than two-thirds of the children remain unaffected—that is, they continue to fall behind. . . ." 116 Cong. Rec. H1406, S2798-9. (President's emphasis).

sure of a cooperative public school board parochial schoolmen could be expected to seek the election of school board members amenable to parochial schoolmen's desires. Over thirty years ago Missouri's Supreme Court ruled unconstitutional an arrangement under which public school boards serve the educational objectives of church schoolmen, for under such arrangement public school boards would be the center of local political battles along religious lines. *Harfst v. Hoegen*, 163 S. W. 2d 609, 612 (Mo., 1942).

This Court has repeatedly said that the Establishment Clause was designed to prevent the "evil" of political division along religious lines. *Lemon*, *supra*, at 622; *Committee for Public Education and Religious Liberty* v. *Nyquist*, ... U. S. ....., 93 S. Ct. 2955 (1973); *Wolman* v. *Essex*, 342 F. Supp. 399, 417 (1972), aff'd, 409 U. S. 808 (1972).

> ". . . modern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support . . . in constitutional adjudication some steps, which when taken were thought to approach 'the verge,' have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop. Development by momentum is not invariably bad; indeed, it is the way the common law has grown, but is a force to be recognized and reckoned with. The dangers are increased by the difficulty of perceiving in advance where the 'verge' of the precipice lies." *Lemon*, *supra*, at 624-625.

The mandate's potential of political divisiveness on religious lines serves as a warning. The State of Missouri

needs no such political divisiveness. Nor does the United States or any state thereof need a Federally-funded educational program made to order for such political division.

One other aspect of this political potential deserves mention. If states may refuse to use tax funds raised by the operation of their own law for sending public school personnel into parochial schools but must use tax funds raised by the operation of Federal law for such purpose, there, it can be expected, will be political pressure at the Federal level to raise the amount of tax dollars expendable under Title I. Church schoolmen would have reason to push for an expansion of Title I, and they could be expected to do so. This Court's ratification of the trial court's mandate could only encourage further political action to make the United States the patron of personnel services in parochial schools, since State constitutional provisions could obstruct the use of State-raised funds for such purpose.

CONCLUSION

Amicus respectfully urges the Court to rule against the concept of comparability and method of delivery of Title I services ordered by the trial court pursuant to the appellate court's mandate because (1) Federal law provides no basis for the mandated delivery system; (2) Federal law contemplated extensive teacher services on public school premises but not on parochial school premises; (3) Federal law forbids Federal control of Title I services and requires that Title I services in Missouri must conform to State law, but the controlling State law provides no basis for the principle and procedure implicit in the trial court's order; (4) publicly-financed teacher services mandated by the trial court would necessarily aid

parochial schools; (5) the involvement of parochial school officials with public school officials in planning and evaluating Title I programs and the performance of public teacher tasks on parochial school premises, as mandated by the trial court, would inevitably foster impermissible administrative entanglement betwen public and parochial school officials and teachers, and (6) the philosophy and procedure implicit in the trial court's order carry a potential of political division on religious grounds.

Respectfully submitted,

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Copies are being forwarded to attorneys of record for the parties this 28th day of November, 1973.